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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 786

JOSEPH NICOLETTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–9) is reported at 310 F. 2d 359.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 1962. A petition for a rehearing was denied on January 4, 1963. The petition for a writ of certiorari was filed on February 2, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court in a perjury prosecution properly refused to instruct the jury that the falsity of petitioner's testimony that he did not recall an event must be proved by the two-witness rule, where petitioner did not dispute the fact that the event had actually occurred.

2. Whether the alleged perjurious statement was material.

3. Whether a witness who gave false testimony in a criminal trial is exonerated from the penalties of perjury by reason of the subsequent acquittal of the defendant.

STATUTE INVOLVED

18 U.S.C. 1621 provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner was charged in the Northern District of Illinois with perjury in violation of 18 U.S.C. 1621. The indictment alleged that on October 24, 1960, petitioner testified as a defense witness under oath at

a trial of a criminal case in that district prosecuted by the United States against Anthony Joseph Accardo, and that it became material to learn whether Accardo had performed any services for Premium Beer Sales, Inc. during 1956, 1957, and 1958 and whether certain defense witnesses had previously made statements inconsistent with their trial testimony. The indictment further charged that petitioner wilfully testified falsely (1) that he did not recall being interviewed by two F.B.I. agents on May 26, 1959, and (2) that he did not disclose to the agents in the interview that he took Fox Head 400 Beer as a favor to Bob Ord and that he was not acquainted and never had any dealings with Anthony Accardo, Jack Cerone, or Joseph Gagliano (App. 4–5).[1]

Following a jury trial, petitioner was found guilty. He was sentenced to imprisonment for a period of eighteen months (App. 209).

1. The evidence may be summarized as follows: On October 24, 1960, petitioner appeared as a defense witness at the trial of Anthony Joseph Accardo (App. 22–23, 28–29). On direct examination, he testified that on October 1 or 2, 1956, Accardo came to his tavern on behalf of Premium Beer Sales and sold him 10 cases of Fox Head 400 Beer; that at that time he saw Accardo's automobile (which he identified at the trial from a photograph) parked in front of his tavern; that he gave Accardo another beer order in November 1956; and that he had seen Ac-

[1] "App." refers to the appellant's appendix in the court below.

cardo 15 or 20 times at his tavern during 1956, 1957, and 1958 (App. 29–34). On cross-examination petitioner stated that he did not recall any interview on May 26, 1959 with two F.B.I. agents, Vincent L. Inserra and Paul B. Frankfurt, at his place of business and that he did not recall telling these agents either that he purchased Fox Head beer as a favor to Bob Ord or that he was not acquainted with Accardo, Jack Cerone, or Joseph Gagliano (App. 44–47). Petitioner did remember an earlier 1954 or 1955 interview with F.B.I. agents concerning a tavern association (App. 46).

F.B.I. agents Inserra and Frankfurt testified that they did in fact interview petitioner. They related that petitioner told them he had purchased Fox Head beer from Bob Ord as a favor and that he was not acquainted with Accardo, Jack Cerone, and Joseph Gagliano. The agents testified that when they showed petitioner a picture of Accardo at the interview, he stated that he did not know the person in the photograph (App. 48–57, 139–141).[2]

2. The court, at the request of petitioner, instructed the jury as follows (App. 203–204):

> I instruct you the recollection of a witness must be shown by circumstantial evidence but it is not enough that the evidence raise an inference of guilt. In view of the requirement

[2] A sales report of Premium Beer Sales introduced into evidence shows that on March 16, 1956, Jack Cerone opened a new account at Nicoletti's restaurant covering the sale of 5 cases of Fox Head Beer (Ex. 4).

that proof of the defendant's recollection of the incident which he denies recollecting must establish the fact of his guilt beyond a reasonable doubt, something more is necessary to convict than proof that the act not remembered did occur.

I instruct you that whether you believe the defendant was or was not interviewed by Agents Inserra and Frankfurt on May 26, 1959 is not the issue here. The issue to be determined by you is whether or not the defendant willfully and knowingly spoke falsely in his testimony given on October 24, 1960 when he said he did not recall the interview.[3]

The court refused to give the following instruction on the two-witness rule (App. 165–166, 188–189, 207–208):

Before you can convict the defendant of wilful and corrupt perjury, as charged in the indictment, you must believe from the evidence, that the defendant, in the judicial proceedings alleged in the indictment, after being duly sworn to tell the truth, did wilfully and corruptly testify falsely to a matter material to the

[3] The first paragraph of the above instruction was given in the exact form requested by petitioner (App. 174–175, 193). The form of the second paragraph was modified by the court (App. 189–190). As originally submitted by petitioner it read (App. 166):

"I instruct you it is immaterial whether you believe the defendant was or was not interviewed by Agents Inserra and Frankfurt on May 26, 1959. The sole issue to be determined by you is whether or not the defendant wilfully and knowingly lied in his testimony given on October 24, 1960 when he said he did not recall the interview."

> issues there involved, in manner and form as alleged in the indictment. It is sufficient to convict the defendant if it appears from the evidence, beyond a reasonable doubt, by the testimony of two witnesses, or from the testimony of one witness and such corroborative circumstances as in your opinion is equivalent to the testimony of two witnesses that the defendant did wilfully and corruptly testify falsely as to some material matter in the judicial proceedings as alleged in the indictment.

ARGUMENT

1. Petitioner, at his own request, succeeded in having the trial court narrow the issue in the case to the question of whether petitioner testified falsely when he said that he did not recall his interview with the F.B.I. agents. Petitioner did not contest the fact that he had been interviewed by two F.B.I. agents on May 26, 1959. The only issue which he tendered was his recollection or lack of recollection of the interview. This issue, as to his state of mind, necessarily depended upon circumstantial evidence. Indeed petitioner *did not* in the district court contend otherwise. At his request, the trial judge instructed the jury that "the recollection of a witness must be shown by circumstantial evidence" (see *supra*, p. 4).

On this issue, there is no room for application of the "two witness" rule requiring proof by the "direct" testimony of two independent witnesses or by the "direct" testimony of one witness and corroborative circumstances. The rule applies to the proof of objective facts—whether an event did or did not occur. It has

no application to subjective facts—*i.e.*, the defendant's state of mind. Such facts, which are incapable of direct proof, must of necessity be proved otherwise. The difference was expressed in *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 411: "* * * while objective facts may be proved directly, the state of a man's mind must be inferred from the things he says or does." Since in this case there was no dispute at all as the objective facts, there was no occasion for an instruction on the two-witness rule. Accord, *United States* v. *Beach*, 296 F. 2d 153 (C.A. 4); *Behrle* v. *United States*, 100 F. 2d 714 (C.A. D.C.); *Fotie* v. *United States*, 137 F. 2d 831 (C.A. 8).

2. Petitioner does not quarrel with the principle that the trial court should determine as a matter of law whether the false statements were material. His contention is that the portions of the Accardo record introduced into the evidence at the trial—the indictment and petitioner's testimony—were insufficient to show the materiality of his statements.

The indictment in the Accardo case charged that Accardo made and subscribed income tax returns for the years 1956, 1957, and 1958 which contained false statements in violation of Section 7206(1) of the Internal Revenue Code of 1954 in that he claimed automobile expenses in promoting beer sales as an employee of Premium Beer Sales, when in fact the automobile expenses were not incurred in that activity. The substance of petitioner's direct testimony on Accardo's behalf was that Accardo sold him beer dur-

ing those years and used his automobile in so doing. On cross-examination, petitioner could not recall an interview with F.B.I. agents in which he had made statements contradictory to this direct testimony. It was this testimony on cross-examination which was the basis of the perjury charge.

The central issue of the Accardo case, as charged in the indictment, was whether Accardo used his automobile in selling beer. The questions asked on cross-examination were plainly designed to impeach petitioner's testimony that Accardo had sold him beer and had on one occasion used his automobile for this purpose. They therefore plainly related to the central issue of the Accardo case. Since petitioner's "false testimony was capable of influencing the tribunal on the issue before it," it was material. *Blackmon* v. *United States*, 108 F. 2d 572, 573 (C.A. 5).

Petitioner's complaint on materiality seems to be that, in affirming the conviction, the court of appeals referred not only to the indictment and portions of the testimony before the trial judge, but to the entire record of the Accardo trial which had been before the court of appeals in *United States* v. *Accardo*, 298 F. 2d 133 (C.A. 7). However, as we have just shown, the indictment and petitioner's testimony alone showed materiality. Consequently, the trial judge was correct in holding that petitioner's false statements were material on the evidence before him. It is not significant therefore that the court of appeals found this con-

clusion supported by consideration of the whole record.

3. Petitioner also contends that the acquittal of Accardo on the second trial, at which petitioner did not testify, warrants a new trial. Deliberately false testimony on a material issue, however, is perjury, whatever the ultimate result of the trial itself. *United States* v. *Williams*, 341 U.S. 58.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1963.

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[1] Petitioner suggests (Pet. 10) that the failure of the government to introduce the full record of the Accardo trial deprived petitioner of the opportunity to make certain arguments on the issue of materiality. However, if as we have shown the government adequately showed materiality, it was up to petitioner to introduce any evidence needed for his defense.